STATE OF MICHIGAN

COURT OF APPEALS

KRISTI A. HESS,

Plaintiff/Counter Defendant-Appellant,

v

ANDREW J. HESS,

Defendant/Counter Plaintiff-Appellee.

UNPUBLISHED
April 17, 2014

No. 317203
Lapeer Circuit Court
Family Division
LC No. 11-044074-DM

Before: SERVITTO, P.J., and FORT HOOD and BECKERING, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's opinion and order that denied her motion to modify parenting time and the school district of the parties' three minor children, and her motion for joint parenting time transportation. We affirm in part and remand in part.

I. PERTINENT FACTS AND PROCEDURAL HISTORY

Plaintiff and defendant were married on May 10, 1997, and had three children together. The parties' relationship broke down, and on May 21, 2012, the trial court entered a judgment of divorce adopting terms agreed upon by the parties. The judgment provided that plaintiff and defendant were to share joint legal and physical custody of the children. The judgment provided that the children would live at plaintiff's house during the week and that defendant was to have parenting time every weekday after the children finished school until approximately 7:00 p.m. The parties alternated weekend parenting time. The judgment of divorce did not order child support, and this deviation from the Michigan Child Support Guidelines was "due to the children spending an equal amount of time with each parent and due to other 'in kind' consideration in this judgment . . . ." Defendant's mother, Catherine Seymour, owned the parties' marital home and she entered into a land contract with plaintiff wherein plaintiff was permitted to live in the marital home after the judgment of divorce was entered. The "in kind" consideration referred to by the judgment of divorce was an agreement that as long as plaintiff lived in the home, she was not required to make payments to Seymour, but interest would accrue.

Regarding the children's schools, the judgment of divorce provided that:

> [I]f Plaintiff/Mother is still residing in the marital home at the beginning of the 2012/2013 school year the parties' youngest child shall attend Bishop Kelley preschool and school in Lapeer County so long as the paternal grandmother pays all of the tuition and costs associated with the attendance at preschool and school.

Lastly, the judgment provided that if plaintiff moved and wanted to remove the children from their current school system, she was required to petition the trial court for permission to change the children's school.

After the judgment of divorce was entered, plaintiff moved to Macomb, Michigan, and purchased a new home. The children continued to attend school in Lapeer. Every morning before work plaintiff drives approximately one hour to take the children to school in Lapeer. She then drives approximately one hour to her place of employment in Warren, Michigan. After work, plaintiff drives approximately one hour to Lapeer to pick up the children from Seymour's house, where defendant lives, then drives approximately one hour to return home. In total, plaintiff testified that the children spend approximately two hours in her car each day and that she spends over four hours driving each day. Plaintiff testified that she spends approximately $500 per month on fuel.

On November 16, 2012, plaintiff filed a motion to modify parenting time and to change the children's school district. Plaintiff sought to modify parenting time such that defendant's parenting time would be reduced from five evening visits during the week to one evening visit on Tuesday from after school until 8:00 p.m. Under plaintiff's proposal, the parties would continue to have parenting time on alternate weekends. Plaintiff argued that this change would not alter the children's established custodial environment. Plaintiff also sought child support. On November 26, 2012, the trial court entered an order referring the matter to the Friend of the Court referee regarding support modification, custody, and parenting time.

On December 26, 2012, plaintiff filed a motion for joint parenting time transportation. She proposed that she would drive the children to school in the morning and that defendant would return the children to plaintiff's home in Macomb in the evening. Alternatively, she proposed that the parties meet halfway in the morning and evening. On January 7, 2013, the trial court entered an order referring the matter to the referee.

Following a two-day evidentiary hearing, the referee found that the children had an established custodial environment with both parties and that plaintiff's motion to change schools and parenting time was essentially a motion for sole physical custody. The referee also found that plaintiff's proposed changes to the children's schools and custody would change the children's established custodial environment. Specifically, the referee concluded that defendant would lose much of the time he spent with the children on weekdays under plaintiff's proposed modifications. The referee also concluded that defendant would have to drive in order to make up the time he lost, which would be cost-prohibitive, given his income. As such, under plaintiff's proposed modifications, defendant was effectively relegated to a weekend parent, thereby changing the children's established custodial environment.

Because it concluded that the proposed modifications would change the children's established custodial environment, the referee concluded that plaintiff had the burden of

establishing, by clear and convincing evidence, that the proposed modifications were in the best interests of the children. The referee found that plaintiff failed to meet this burden with regard to her motion to change custody, the children's schools, and parenting time. Of the best-interest factors set forth in MCL 722.23, the referee found that the parties were equal on factors (a), (c), (d), (e), (h), (j), and (k). The referee found that factor (b), the capacity and disposition of the parties to give the children love, affection, and guidance, favored plaintiff because, although both parties loved the children, defendant "is a binge drinker" and the children were aware of his problem, yet defendant continued to drink. Additionally, the referee found that factor (f), the moral fitness of the parties, favored plaintiff because "[d]efendant appears to be an unrepentant alcoholic." Further, the referee found that factor (g), the mental and physical health of the parties, favored plaintiff because of defendant's alcohol use, and because of what it described as an "[a]lleged"[1] incident where defendant was intoxicated and threatened plaintiff with a gun.

Based on the evidence presented, the referee found that plaintiff failed to establish, by clear and convincing evidence, that the proposed change of custody was in the children's best interests. The referee concluded that although plaintiff spent a considerable amount of time each day driving with the children, she made the choice to move to Macomb, and could have moved to a city that was closer to defendant and the children's school.

Finally, with regard to the issue of child support, the referee concluded that

> [c]hild support received little attention due to the complexity of the parenting time and change/choice of school issues. Neither party addressed the child support deviation issue. It was conceded in the Judgment of Divorce that the child support provision deviated from the Michigan Child Support Formula, but the child support which would otherwise have been recommended by the formula was never addressed. [Emphasis in original.]

Consequently, the referee recommended that child support be denied.

On May 20, 2013, plaintiff filed a list of objections to the recommendation, and requested a de novo review of the record. The trial court held a hearing on June 10, 2013, and allowed the parties to make oral arguments. On July 5, 2013, the trial court entered a written opinion and order denying plaintiff's motions.

II. MOTION TO CHANGE SCHOOL DISTRICT AND PARENTING TIME

Plaintiff contends that the trial court erred in finding that the proposed change of schools would alter the established custodial environment. She also contends that the trial court applied the incorrect burden of proof and improperly addressed the matter from defendant's standpoint, rather than the children's standpoint.

[1] The referee appeared to doubt the credibility of plaintiff's testimony with regard to this incident.

> Under the Child Custody Act, MCL 722.21 *et seq.*, all orders and judgments of the circuit court shall be affirmed on appeal unless the trial judge made findings of fact against the great weight of evidence or committed a palpable abuse of discretion or a clear legal error on a major issue. Under this standard, a reviewing court should not substitute its judgment on questions of fact unless the factual determination clearly preponderate[s] in the opposite direction. [*Pierron v Pierron*, 486 Mich 81, 85; 782 NW2d 480 (2010) (citations and internal quotation marks omitted).]

The trial court's decision concerning whether a proposed modification will change the children's established custodial environment is a factual finding that we review against the great weight of the evidence standard. *Gagnon v Glowacki*, 295 Mich App 557, 572; 815 NW2d 141 (2012).

"[W]hen considering an important decision affecting the welfare of the child, the trial court must first determine whether the proposed change would modify the established custodial environment of that child. In making this determination, it is the child's standpoint, rather than that of the parents, that is controlling." *Pierron*, 486 Mich at 92.

> The established custodial environment is the environment in which over an appreciable time the child naturally looks to the custodian in that environment for guidance, discipline, the necessities of life, and parental comfort. While an important decision affecting the welfare of the child may well require adjustments in the parenting time schedules, this does not necessarily mean that the established custodial environment will have been modified. If the required parenting time adjustments will not change whom the child naturally looks to for guidance, discipline, the necessities of life, and parental comfort, then the established custodial environment will not have changed. [*Id.* at 85-86 (citations and internal quotation marks omitted).]

Whether the proposed modification would change the child's established custodial environment affects the moving party's burden of proof:

> If the proposed change would modify the established custodial environment of the child, then the burden is on the parent proposing the change to establish, by clear and convincing evidence, that the change is in the child's best interests. Under such circumstances, the trial court must consider all the best-interest factors because a case in which the proposed change would modify the custodial environment is essentially a change-of-custody case. On the other hand, if the proposed change would *not* modify the established custodial environment of the child, the burden is on the parent proposing the change to establish, by a preponderance of the evidence, that the change is in the child's best interests. [*Id.* at 92-93 (emphasis in original).]

The referee found that there was an established custodial environment with both parties.[2] Such a finding was not against the great weight of the evidence. See *id.* at 85. Although the children sleep at plaintiff's house during the week, they see both plaintiff and defendant every day during the week. Defendant testified that, although his mother usually cooks dinner for the children, he usually picks the children up from school, helps them with their homework, eats dinner with them, and plays with them. Defendant testified that his oldest child comes to him to talk about his feelings, the middle child has opened up to him, and the youngest child is bonded with him. Defendant tells the children he loves them every day and that he is proud of them almost every day. Defendant disciplines the children, does laundry, and bathes the children. Darlene Dougherty, defendant's aunt, also testified about defendant's care for and involvement with the children. She testified that the children listen to him and respect him. According to Dougherty, the children have a bond with defendant and cannot wait to see him. In light of this evidence, the conclusion that the children had an established custodial environment with both plaintiff and defendant was not against the great weight of the evidence. *Id.*

We also conclude that the trial court's finding, that plaintiff's proposed modifications would change the children's established custodial environment, was not against the great weight of the evidence. See *Gagnon*, 295 Mich App at 572. Defendant is with the children every day after school from approximately 4:15 p.m. until plaintiff picks them up at approximately 7:00 p.m., in addition to alternate weekends. While plaintiff argues that defendant does not actually spend that time with the children, there was evidence that defendant cares for the children when he returns from work. Additionally, despite conflicting testimony concerning how much time defendant actually spends with the children, the referee found that the children spend roughly equal time awake and interacting with both parents. "[T]his Court defers to the trial court's determinations of credibility." *Berger v Berger*, 277 Mich App 700, 707; 747 NW2d 336 (2008) (quotation omitted). Under plaintiff's proposed changes, defendant would have parenting time one[3] evening a week and the parties would share the transportation by taking turns driving or meeting halfway. However, the record reveals that driving in such a manner would be cost-prohibitive for defendant. Thus, defendant's time with the children would essentially be reduced from five weeknights to one. The evidence does not clearly preponderate in the opposite direction of the conclusion that such changes would modify the children's established custodial environment. These proposed changes would effectively make defendant no more than a "'weekend' parent." See *Powery v Wells*, 278 Mich App 526, 528; 752 NW2d 47 (2008). See also *Gagnon*, 295 Mich App at 573 (concluding that if the move would render defendant's weekday parenting time too difficult to continue, it would render the defendant a "weekend-only parent," and "a change in the established custodial environment would result."). Indeed,

[2] The trial court did not specifically address the established custodial environment or the effect of the change on the established custodial environment, but denied plaintiff's objections. Accordingly, we refer to the referee's findings.

[3] In her motion to modify parenting time and change the children's school, plaintiff proposed giving defendant one evening per week with the children. When she testified at the evidentiary hearing, she indicated that she would be open to giving defendant "one to two evenings with the kids[.]"

defendant sees the children every day after school, eats dinner with them, and helps them with their school work. A drastic reduction in defendant's parenting time such as the one proposed by plaintiff would change to whom the children naturally looked for guidance, discipline, and the necessities of life. See *Pierron*, 486 Mich at 86-87.

Plaintiff argues that the proposed changes would not modify the established custodial environment and that the referee improperly distinguished *Pierron*. In *Pierron*, the parties shared joint legal custody of the children and the children's primary residence was with the defendant. *Id.* at 84. The parties both lived in Grosse Pointe Woods until the defendant moved to Howell, approximately 60 miles away. *Id.* The plaintiff objected to enrolling the children in Howell Public Schools. *Id.* The Michigan Supreme Court found that the change of schools did not significantly modify the established custodial environment with the plaintiff. *Id.* at 87-89. The children visited the plaintiff approximately three weekends out of four. *Id.* at 87. Before the action, the children did not stay overnight with the plaintiff during the school year, but may have occasionally done so after the trial court entered an order requiring the children to attend Grosse Pointe schools. *Id.* at 87 n 3. The plaintiff occasionally took the children to dinner during the week and took the children to lunch one week out of every seven. *Id.* at 87. The Court found that the plaintiff's weekend parenting time would not be affected and his occasional midweek activities could be continued, although it would be more inconvenient for the plaintiff to see the children. *Id.* at 88. The Court found that, from the children's perspective, the changes to the established custodial environment would be minor, if any, and did not legally change the established custodial environment. *Id.* at 89.

We find that *Pierron* is factually distinguishable from the case at bar. From the children's perspective in *Pierron*, the changes to the established custodial environment would have been minimal, if any, because the plaintiff's parenting time would be largely unaffected by the defendant's proposed changes. *Id.* Here, by contrast, defendant's parenting time would be drastically affected by plaintiff's proposed changes. Indeed, he would go from seeing the children every day after school to seeing them once, perhaps twice, per week, other than on his allotted weekends. The children would go from spending roughly an equal amount of their waking hours with each parent to spending just a few hours with defendant per week under plaintiff's proposed changes. Thus, from the children's perspectives, the changes to their established custodial environment would be, unlike in *Pierron*, significant.

We also find that the case at bar is distinguishable from our decision in *Gagnon*. In *Gagnon*, 295 Mich App at 561, the parties shared joint legal and physical custody of the child, with the child primarily residing with the plaintiff and the defendant having parenting time every Tuesday and Thursday evening, alternate weekends, and overnight every other Thursday. The plaintiff sought to move to Windsor. *Id.* at 563. After the move, the proposed parenting time schedule would be essentially the same, with the defendant receiving an additional weekend a month. *Id.* at 573. This Court found:

> While the move to Windsor likely means the end of spontaneous lunches during the week and Thursday overnights with defendant, defendant still can have the Tuesday/Thursday evening parenting time. The loss of the weekday overnight and the lunches is insufficient to destroy the established custodial environment between the child and defendant. Therefore, the trial court finding that the

> established custodial environment would not change if defendant was given an extra weekend per month and continued to maintain his current parenting time was not against the great weight of the evidence. If the child continued to see his father on weekdays and an extra weekend per month, he would continue to look to his father for guidance, discipline, necessities, and comfort. [*Id.* (citation omitted).]

However, this Court noted that "the trial court's finding that the extra weekend per month of parenting time would offset the lack of any weekday parenting time if weekday visits became too difficult to continue, is erroneous." *Id.* "On the contrary, if the move were to render defendant a weekend-only parent, a change in the established custodial environment would result." *Id.*

Here, in contrast to *Gagnon*, defendant would not be able to maintain anywhere near his current parenting time under the changes proposed by plaintiff. Indeed, rather than seeing defendant every day after school, the children would be relegated to seeing defendant once, perhaps twice a week. Because driving the children every day would be cost-prohibitive for defendant, the case is similar to what we cautioned against in *Gagnon*. Notably, we cautioned that if the plaintiff in *Gagnon* could not maintain his midweek visits because such visits became too difficult to continue, the plaintiff would effectively be rendered a "weekend-only parent," and "a change in the established custodial environment would result." *Id.* Here, where defendant would only receive one, perhaps two visits with the children per week, and where he would be unable to drive them to plaintiff's house every day, the change proposed by plaintiff would drastically reduce defendant's weekday parenting time, thereby effectively rendering him a "weekend-only parent," and "a change in the established custodial environment would result." See *id.*

Additionally, although plaintiff does not argue that the trial court's finding that, under the clear and convincing evidence standard, plaintiff failed to meet her burden of proving that the proposed changes were in the children's best interests, we find that the trial court's ultimate custody determination in this case was not an abuse of discretion. See *Shulick v Richards*, 273 Mich App 320, 323; 729 NW2d 533 (2006).

III. THE TRIAL COURT'S REVIEW OF REFEREE RECOMMENDATION

Next, plaintiff contends that the trial court's review of the referee's recommendation and the transcript of the hearings before the referee fell short of the de novo procedure set forth in MCL 552.507(4)-(6) and MCR 3.215(F). Plaintiff argues that she was not allowed to present evidence and live testimony on the objected to findings.

Plaintiff objected to the referee's recommendation and requested a "judicial hearing." However, she never requested a live hearing or the opportunity to present evidence. At the hearing on her objections, she merely requested the opportunity to make oral arguments. Accordingly, this issue was not raised before or addressed by the trial court and is unpreserved. See *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004). "Review of an unpreserved error is limited to determining whether a plain error occurred that affected substantial rights." *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

MCL 552.507(4)-(6) governs judicial review of a referee's recommendation and provides:

> (4) The court shall hold a de novo hearing on any matter that has been the subject of a referee hearing, upon the written request of either party or upon motion of the court. The request of a party shall be made within 21 days after the recommendation of the referee is made available to that party.
>
> (5) A hearing is de novo despite the court's imposition of reasonable restrictions and conditions to conserve the resources of the parties and the court if the following conditions are met:
>
> (a) The parties have been given a full opportunity to present and preserve important evidence at the referee hearing.
>
> (b) For findings of fact to which the parties have objected, the parties are afforded a new opportunity to offer the same evidence to the court as was presented to the referee and to supplement that evidence with evidence that could not have been presented to the referee.
>
> (6) Subject to subsection (5), de novo hearings include, but are not limited to, the following:
>
> (a) A new decision based entirely on the record of a previous hearing, including any memoranda, recommendations, or proposed orders by the referee.
>
> (b) A new decision based only on evidence presented at the time of the de novo hearing.
>
> (c) A new decision based in part on the record of a referee hearing supplemented by evidence that was not introduced at a previous hearing.

MCR 3.215(F) also governs a judicial hearing to review a referee's findings and provides, in pertinent part:

> (2) To the extent allowed by law, the court may conduct the judicial hearing by review of the record of the referee hearing, but the court must allow the parties to present live evidence at the judicial hearing. The court may, in its discretion:
>
> (a) prohibit a party from presenting evidence on findings of fact to which no objection was filed;
>
> (b) determine that the referee's finding was conclusive as to a fact to which no objection was filed;
>
> (c) prohibit a party from introducing new evidence or calling new witnesses unless there is an adequate showing that the evidence was not available at the referee hearing;

(d) impose any other reasonable restrictions and conditions to conserve the resources of the parties and the court.

(3) If the court determines that an objection is frivolous or has been interposed for the purpose of delay, the court may assess reasonable costs and attorney fees.

In *Dumm v Brodbeck*, 276 Mich App 460, 465-466; 740 NW2d 751 (2007), this Court explained:

> In earlier versions of this court rule, the trial court was permitted to base its review solely on the FOC record only if the parties consented. However, recent amendments of the statute and court rule have lifted this restriction, and the trial court is no longer prevented from considering an FOC report or recommendation if it also allows the parties to present live evidence. As noted earlier, defendant neither asked to present live evidence before the trial court nor presented any documentation or affidavits to support his allegations. The October 11, 2006, hearing before the trial court satisfied the requirement in MCL 552.507(4) specifying that a trial court shall hold a de novo hearing on any matter that has been the subject of a referee hearing on the written request of either party or by motion of the court. Contrary to defendant's assertion on appeal, the trial court properly reviewed the FOC record and issued a proper order in reliance on the FOC recommendation. [Internal citations and quotation marks omitted.]

In this case, plaintiff filed objections to the referee's recommendation and requested a "judicial hearing." Plaintiff was not provided the opportunity to present evidence or live testimony in front of the trial court. The trial court heard arguments and then made its decision based on a review of the transcript of the referee hearing. Plaintiff, however, never requested to present evidence or live testimony and did not make an offer of proof regarding any new evidence. See *id.* at 465-466. Accordingly, plaintiff fails to identify error, let alone plain error requiring reversal. See *id.* at 466.

Plaintiff contends that, on several issues, her trial counsel "plainly objected to the referee on several points and was not allowed her statutory right to have the trial court assess *de novo* the evidence on those issues." Plaintiff misconstrues the record. Her trial counsel neither asked to present live evidence nor presented any new evidence. Rather, her trial counsel simply summarized what was presented before the referee and asked the trial court to "keep those things in mind when reviewing and making a de novo review." Consequently, plaintiff fails to identify error, let alone error that was plain or obvious. *Rivette*, 278 Mich App at 328; *Dumm*, 276 Mich App at 466.

IV. CHILD SUPPORT

Finally, plaintiff contends that the trial court erred by declining to award child support. "Generally, child support orders, including orders modifying child support, are reviewed for an abuse of discretion. However, whether the trial court properly applied the [Michigan Child Support Formula (MCSF)] presents a question of law that we review de novo." *Clarke v Clarke*, 297 Mich App 172, 178-179; 823 NW2d 318 (2012) (internal citation omitted).

> It is well settled that children have the right to receive financial support from their parents and that trial courts may enforce that right by ordering parents to pay child support. However, once a trial court decides to order the payment of child support, the court must order child support in an amount determined by application of the child support formula. . . . A trial court must strictly comply with the requirements of the MCSF in calculating the parents' support obligations unless it determines from the facts of the case that application of the child support formula would be unjust or inappropriate. . . . If the trial court determines that deviation from the formula is warranted, it must set forth in writing or on the record (1) the amount of child support determined by application of the formula, (2) how the order deviates from the formula, (3) the value of property or other support awarded instead of the payment of child support, if applicable, and (4) the reasons why application of the formula would be unjust or inappropriate in the case. [*Borowsky v Borowsky*, 273 Mich App 666, 672-673; 733 NW2d 71 (2007) (citations and internal quotation marks omitted).]

"[A] child support order may be modified by the trial court 'upon a showing by the petitioning party of a change in circumstances sufficient to justify [the] modification.'" *Clarke*, 297 Mich App at 189 (quotation omitted). In this case, the trial court, in referring the matter to the referee, concluded that plaintiff's decision to move out of the house on which payments on a land contract to Seymour were eschewed as consideration for forgoing child support payments constituted a change of circumstances that justified modifying the previous child support order contained in the judgment of divorce. Neither party challenges that finding, and we agree that the move constituted a change of circumstances to justify modifying the support order. Thus, we turn to the trial court's decision not to award any child support in this case.

Concerning child support, MCL 552.605(2) provides:

> (2) Except as otherwise provided in this section, the court shall order child support in an amount determined by application of the child support formula developed by the state friend of the court bureau as required in section 19 of the friend of the court act, MCL 552.519. The court may enter an order that deviates from the formula if the court determines from the facts of the case that application of the child support formula would be unjust or inappropriate and sets forth in writing or on the record all of the following:
>
> (a) The child support amount determined by application of the child support formula.
>
> (b) How the child support order deviates from the child support formula.
>
> (c) The value of property or other support awarded instead of the payment of child support, if applicable.
>
> (d) The reasons why application of the child support formula would be unjust or inappropriate in the case.

The trial court did not specifically address the child support issue, but denied plaintiff's objections to the referee's recommendation. The referee stated that, although both parties provided their W-2s, they did not address their expenses and gave little attention to the child support issue. The trial court and referee did not comply with MCL 552.605(2) because they did not determine and apply the child support formula. See *Borowsky*, 273 Mich App at 673. They did not set forth that amount or explain how the support order deviated from the support formula. See *id.* They did not note the value of property or other support awarded in lieu of child support. Accordingly, we remand for the trial court to apply the statutory procedures.

Affirmed in part and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Karen M. Fort Hood
/s/ Jane M. Beckering